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No. 07-1209

In the Supreme Court of the United States

JAMES B. PEAKE,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, requires the Department of Veterans Affairs (VA) to provide a notice to benefits claimants. Under 38 U.S.C. 7261(b)(2) (Supp. V 2005), review of administrative decisions resolving claims for veterans benefits must "take due account of the rule of prejudicial error." The question presented is:

Whether the court of appeals erred in holding that a failure of the VA to give the notice required by the VCAA must be presumed to be prejudicial.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-21a, 56a-64a) are reported at 487 F.3d 881 and 487 F.3d 892. The decisions of the United States Court of Appeals for Veterans Claims (Pet. App. 24a-39a, 67a-82a) are unreported. The decisions of the Board of Veterans' Appeals (Pet. App. 40a-55a, 83a-96a) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on May 16, 2007. Petitions for rehearing were denied on October 23 and 24, 2007 (Pet. App. 22a-23a, 65a-66a). On January 14, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 20, 2008. On February 8,

2008, the Chief Justice further extended the time to March 21, 2008, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 16, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

1. Veterans who wish to claim benefits must submit an application to the Department of Veterans Affairs (VA). See 38 U.S.C. 5100 *et seq.* Under the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, the VA is required to assist veterans in developing claims. Specifically, the VCAA directs that, "[u]pon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." § 3(a), 114 Stat. 2096-2097 (38 U.S.C. 5103(a)). The notice must also "indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary * * * will attempt to obtain on behalf of the claimant." *Id.* at 2097 (38 U.S.C. 5103(a)); see 38 C.F.R. 3.159.[1]

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[1] At the time of the decisions below, 38 C.F.R. 3.159(b)(1) provided that the "VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim." In April 2008, the regulation was amended to eliminate that requirement. See 73 Fed. Reg. 23,353, 23,354, 23,356.

The initial decision on a benefits claim is issued by a VA regional office. See *Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 419 F.3d 1317, 1318 (Fed. Cir. 2005), cert. denied, 547 U.S. 1162 (2006). In addition to providing the notice required by the VCAA, the regional office must assist the claimant by obtaining public and private records relevant to the claim and by providing a medical examination when appropriate. See 38 U.S.C. 5103A. The claimant is also entitled to a hearing for the purpose of presenting additional evidence and arguments. See 38 C.F.R. 3.103(c). If the regional office denies a claim, it must provide the claimant a statement of the reasons for its decision and a summary of the evidence that was considered. See 38 U.S.C. 5104(b); 38 C.F.R. 3.103(b)(1).

A claimant may appeal an adverse decision of the regional office to the Board of Veterans' Appeals (Board), which is a component of the VA. See 38 U.S.C. 301(c)(5), 7101 *et seq.* In certain circumstances, the Board may consider new evidence itself. See, *e.g.*, 38 U.S.C. 7107(b), 7109(a); 38 C.F.R. 20.1304(c). When necessary, it may also remand a case to the regional office. See 38 C.F.R. 19.9.

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court. See 38 U.S.C. 7252. The Veterans Court has authority to "decide all relevant questions of law" and to set aside administrative factual findings that are "clearly erroneous." 38 U.S.C. 7261(a)(1); 38 U.S.C. 7261(a)(4) (Supp. V 2005). In reviewing a decision of the Board, the Veterans Court must "take due account of the rule of prejudicial error." 38 U.S.C. 7261(b)(2) (Supp. V 2005). Decisions of the Veterans Court are

subject to review in certain respects in the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over such cases. See 38 U.S.C. 7292 (2000 & Supp. V 2005).

2. a. Respondent Sanders served in the United States Army from 1942 to 1945. In 1948, he filed a claim with a VA regional office, alleging that an eye condition from which he suffered had been caused by an injury sustained during his service. The claim was denied, and Sanders did not appeal. In 1991, Sanders sought to reopen his claim, relying upon statements from two ophthalmologists. The VA reopened the claim and obtained additional evidence, including a report from a VA ophthalmologist, but it ultimately denied the claim. Pet. App. 2a-5a, 25a.

The Board affirmed. Pet. App. 40a-55a. The Board noted that the medical opinions on which Sanders relied were "offered in * * * speculative language and without the benefit of consideration of relevant medical evidence." *Id.* at 54a. Conversely, the VA ophthalmologist had "affirmatively opine[d] that [Sanders] did not lose right eye vision during service or due to the alleged in-service trauma," but that his eye condition was "most likely infectious in nature." *Id.* at 54a-55a. The Board found that opinion "to be more probative" than those of the other physicians. *Id.* at 55a. It therefore concluded that "the preponderance of the evidence [was] against" Sanders's claim that his eye condition was connected to his military service. *Ibid.*

b. Sanders appealed to the Veterans Court, arguing, among other things, that the VA had not complied with the VCAA because it had "failed to provide notice of who would ultimately be responsible for obtaining evidence necessary to substantiate the claim" and had "failed to

provide proper notice before the initial unfavorable decision by the agency." Pet. App. 38a. The court rejected that argument and affirmed the administrative decision. *Id.* at 24a-39a.

The Veterans Court applied the framework for evaluating VCAA notice errors that it had adopted in *Mayfield* v. *Nicholson*, 19 Vet. App. 103 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006). Under *Mayfield*, a failure to inform a claimant of what evidence is necessary to substantiate his or her claim—an error that the Veterans Court referred to as a "first-element" notice error—was presumptively prejudicial. See *id.* at 122-123. But *Mayfield* held that errors in providing the other elements of the notice required by Section 5103(a) were a basis for reversal only if the appellant "identif[ied], with considerable specificity, how the notice was defective and what evidence the appellant would have provided or requested the Secretary to obtain" if appropriate notice had been given, and only if the appellant could "assert, again with considerable specificity, how the lack of that notice and evidence affected the essential fairness of the adjudication." *Id.* at 121.[2]

Because Sanders did not allege a first-element notice error, and because he did not explain how he was prejudiced by the alleged failure of notice, the Veterans Court affirmed the Board's decision denying benefits. Pet. App. 38a. The court did not determine whether any notice error had occurred. *Ibid.*

c. The court of appeals reversed. Pet. App. 1a-21a. The court noted that Section 7261(b)(2) requires the

[2] Neither Section 5103(a) nor Section 7261(b)(2) indicates that errors affecting what the Veterans Court characterized as different "elements" of the notice should be evaluated differently. This brief does not distinguish among the different notice elements.

Veterans Court to "take due account of the rule of prejudicial error," even when evaluating claims that the VA has erred in giving the notice required by the VCAA. *Id.* at 9a; see *Conway* v. *Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004). But the court held that every VCAA notice error should be "presumed prejudicial, requiring reversal unless the VA can show that the error did not affect the essential fairness of the adjudication," which it can do "by demonstrating: (1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law." Pet. App. 14a-15a.

The court of appeals acknowledged the existence of legislative history indicating that Section 7261(b)(2) was intended to incorporate the prejudicial-error rule of the Administrative Procedure Act (APA) (5 U.S.C. 706), which is virtually identical to Section 7261(b)(2). Pet. App. 20a; see S. Rep. No. 418, 100th Cong., 2d Sess. 61 (1988). The court nevertheless held that "the treatment of prejudicial error under the APA is not dispositive," because "[e]ven if Congress had previously intended veterans' claims notice errors to be assessed under the same prejudicial error rule as APA notice errors, such intent was abrogated by the subsequent passage of the VCAA." Pet. App. 20a-21a. In the view of the court of appeals, "requiring veterans to overcome a series of complex legal hurdles in order to secure the assistance mandated by Congress would clearly frustrate the purpose of the VCAA." *Id.* at 21a.

3. a. Respondent Simmons served in the United States Navy from 1978 to 1980. Pet. App. 57a. Upon her discharge, Simmons filed a claim for disability benefits

based on hearing loss in her left ear, but the VA regional office concluded that the degree of hearing loss did not warrant compensation. *Ibid.* In 1998, she asked the VA to reopen her claim and to add a claim for compensation based on hearing loss in her right ear. *Ibid.* The regional office again denied her claim, but the Board remanded, directing the regional office to comply with the notice requirements of the VCAA, which had just gone into effect. *Ibid.* On remand, the regional office again denied the claim. *Ibid.* The Board affirmed, concluding that Simmons's left-ear hearing loss was not sufficiently severe to warrant benefits, see *id.* at 95a, and that there was no "competent evidence of a nexus between the current right ear hearing loss" and Simmons's service, *id.* at 94a.

b. Simmons appealed to the Veterans Court, which reversed the Board's decision. Pet. App. 67a-82a. The Veterans Court determined that the VA had failed to give Simmons notice "of the evidentiary prerequisites for establishing" her claim of left-ear hearing loss, as required by the VCAA. *Id.* at 78a. Because that error was a "first-element" notice error, the court applied a presumption of prejudice, and it imposed on the Secretary the burden of showing "that there was clearly no prejudice" to Simmons as a result of the failure to provide notice of the evidence necessary to substantiate her claim. *Id.* at 80a (quoting *Mayfield*, 19 Vet. App. at 122). The court concluded that the VA had failed to carry its burden because there was no evidence that Simmons had actual knowledge of the evidence needed to substantiate her claim or that a reasonable person would have been aware of what evidence was needed to substantiate the claim. *Id.* at 81a. It therefore held that a remand

was required for Simmons's claim of left-ear hearing loss. *Ibid.*[3]

c. The Secretary appealed, and the court of appeals affirmed. Pet. App. 56a-64a. The court stated that "[o]ur opinion in *Sanders* resolves this issue" because it holds that "once the veteran establishes that the VA has committed a VCAA notice error, the Veterans Court should presume that such error was prejudicial." *Id.* at 63a.

4. The court of appeals denied petitions for rehearing en banc. Pet. App. 22a-23a, 65a-66a.

SUMMARY OF ARGUMENT

Congress directed the Veterans Court to "take due account of the rule of prejudicial error" in reviewing administrative decisions denying veterans' benefits. 38 U.S.C. 7261(b)(2) (Supp. V 2005). It did so by adopting, almost verbatim, the language of the APA's prejudicial-error rule. 5 U.S.C. 706. That rule has long been understood to place upon the party challenging an agency's action the burden of showing not only that the agency erred but also that its error was prejudicial. The court of appeals erred by disregarding that settled interpretation of essentially the same statutory language, creating a presumption of prejudice, and imposing on the VA the burden of overcoming that presumption.

This Court has held that when Congress enacts a statute using language whose interpretation by courts is already settled, it is presumed to have intended to incorporate that interpretation. See *Merrill Lynch, Pierce,*

[3] The Veterans Court also held that the VA had failed to inform Simmons of a scheduled VA medical examination of her right ear. Pet. App. 76a. It remanded that claim to the Board with instructions to "ensure that a new VA medical examination is provided." *Ibid.*

Fenner & Smith Inc. v. *Dabit*, 547 U.S. 71, 85-86 (2006). Applying that principle, the similarity of the language of Section 7261(b)(2) and Section 706, coupled with the well-settled interpretation of Section 706 at the time Section 7261(b)(2) was enacted, suffices to resolve this case. That conclusion is reinforced by legislative history demonstrating that, when Congress enacted Section 7261(b)(2), it intended the review by the Veterans Court to parallel review under the APA, and it understood that the APA's prejudicial-error rule imposes the burden of showing prejudice on the party challenging the agency's action.

Nothing in the text or history of Section 7261(b)(2) authorized the Federal Circuit to override the well-established interpretation of the rule of prejudicial error through the creation of a presumption of prejudice for Veterans Claims Assistance Act notice errors. Nor, contrary to the reasoning of the court of appeals, is there any basis for divining such a presumption from the text or history of the VCAA itself. That statute was simply a reaffirmation and clarification of the VA's existing claims-handling procedures, and it did not amend Section 7261(b)(2) in any way. Although the VCAA described the VA's duty to assist claimants in greater detail than prior law, it did not fundamentally alter the existing process for handling claims. Similarly, the nonadversarial nature of the VA administrative process provides no basis for abandoning ordinary principles of prejudicial error when VA administrative decisions are challenged in court, because Veterans Court review of benefits claims, like other judicial proceedings, is adversarial.

The court of appeals was similarly unjustified in claiming to find support for its decisions in *Kotteakos* v.

United States, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). Those cases concerned the standard of harmless-error review in criminal and habeas corpus proceedings. Such proceedings—in which an individual's liberty is at stake—are far removed from the benefits determinations at issue here and the other types of administrative determinations to which the rule of prejudicial error in Section 706 and Section 7261(b)(2) expressly applies. *Kotteakos* and *O'Neal* are also inapposite because they considered the harmless-error rule in the context of review of trial proceedings in another *court*, which involves considerations not present in the context of judicial review of an administrative-agency determination.

Finally, even if the Veterans Court had discretion to decide whether to apply a presumption of prejudice, such a presumption would be inappropriate. VCAA notice errors do not have the natural effect of producing prejudice, because the VA adjudicative system—which includes many layers of review and obligates the VA to assist claimants in gathering evidence to support their claims—offers many opportunities to correct any error in providing the initial notice required by the VCAA. Moreover, the claimant is much more likely than is the VA to have access to information that would be relevant to determining whether prejudice occurred. Application of traditional principles of prejudicial-error review serves to provide relief to veterans who have actually been harmed by a VA error, while avoiding costly and unnecessary remands in cases of technical errors that did not affect the outcome of the proceeding.

ARGUMENT

A PARTY CHALLENGING THE DENIAL OF A VETERANS-BENEFITS CLAIM MUST SHOW NOT ONLY THAT THE VA ERRED BUT ALSO THAT ITS ERROR WAS PREJUDICIAL

A. Like The Corresponding Provision Of The APA, Section 7261(b)(2) Should Be Construed To Place The Burden Of Showing Prejudice On The Party Challenging Agency Action

Section 7261(b)(2) requires the Veterans Court to "take due account of the rule of prejudicial error." That statute parallels, and draws upon, the APA's prejudicial-error provision, which has long been understood to impose upon a party seeking to overturn an administrative decision the burden of establishing not only that the agency erred but also that its error was prejudicial. Moreover, the text and history of Section 7261(b)(2) make clear that, in enacting that provision, Congress intended to adopt the same rule of prejudicial error as that applied under the APA. The court of appeals erred in disregarding the settled construction of that materially identical statutory language.

1. Section 7261(b)(2) is materially identical to Section 706 and should be given the same construction

Section 7261(b)(2) was enacted in 1988 as part of the Veterans' Judicial Review Act. Pub. L. No. 100-687, Div. A, § 301(a), 102 Stat. 4115, amended by Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401(b), 116 Stat. 2832. That statute defines the scope of the Veterans Court's review of VA decisions in terms paralleling the language of Section 706, which sets out the scope of judicial review of federal administrative actions generally. See § 301(a), 102 Stat. 4115 (38 U.S.C. 7261(a)(1)-(3)).

Significantly, in directing the Veterans Court to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2) (Supp. V 2005), Congress used language that is almost identical to that of Section 706, which provides that "due account shall be taken of the rule of prejudicial error" when courts review the actions of administrative agencies. 5 U.S.C. 706. "[L]inguistic consistency" therefore requires the Veterans Court to apply the same rule of prejudicial error as that applied by courts in cases governed by Section 706. *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829-830 (2002) (quoting *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988)).

a. This Court has held that "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)); see *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-699 (1979). Applying that principle, Section 7261(b)(2) should be read to adopt the settled interpretation of the APA's rule of prejudicial error, rather than to establish a new rule uniquely applicable to appeals of veterans' benefit decisions.

That reading of the statute is reinforced by Congress's use of the word "the" in the phrase "the rule of prejudicial error." The use of the definite article demonstrates that Section 7261(b)(2) refers to a particular existing rule that was established and defined at the time the statute was enacted, and it forecloses any suggestion that Congress intended to establish a new, previously undefined rule. See *Rumsfeld* v. *Padilla*, 542 U.S.

426, 434 (2004) (The habeas statute's "consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition."); *Warner-Lambert Co.* v. *Apotex Corp.*, 316 F.3d 1348, 1356 (Fed. Cir. 2003) (Because the definite article "particularizes the subject which it precedes," the statutory phrase "'the use' refers to a specific 'use' rather than a previously undefined 'use.'") (quoting *American Bus Ass'n* v. *Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000)); *In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir.) (The use of the definite article in a statute calling for "interest at the legal rate" after the filing of a bankruptcy petition indicates "that Congress meant for a single source to be used to calculate post-petition interest.") (quoting 11 U.S.C. 726(a)(5)), cert. denied, 537 U.S. 1072 (2002); see also *United States* v. *Rybicki*, 354 F.3d 124, 137-138 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004). In other words, Congress did not merely direct the Veterans Court to disregard non-prejudicial error; it directed that court to apply a specific and previously defined rule for determining whether an error is prejudicial—namely, "the rule" applied by courts in cases governed by Section 706.

b. The parallel statutory text of Section 7261(b)(2) and Section 706 leads to the conclusion that Section 7261(b)(2) unambiguously forecloses the interpretation reached by the Federal Circuit. There is accordingly no reason to delve deeper into the statutory record. See *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 301-302 (2006). But even if there were any doubt as to whether Section 7261(b)(2) required the Veterans Court to "take due account of the rule of prejudicial error" in the same manner in which "due account [is] taken of the rule of prejudicial error" under Section 706,

that doubt would be eliminated by the legislative history. The Senate Committee Report accompanying the Veterans' Judicial Review Act stated that the statute "would incorporate a reference to the 'rule of prejudicial error' as included in the APA (5 U.S.C. 706)." S. Rep. No. 418, 100th Cong., 2d Sess. 61 (1988); see *id.* at 60 (Although the "standard of review for factual findings is new, the other major scope of review provisions * * * are derived specifically from section 706 of the APA."). That report reinforces the conclusion that Congress intended to adopt the rule of prejudicial error already established and defined under Section 706.

c. Interpreting Section 7261(b)(2) to be consistent with Section 706 is particularly appropriate in light of "the importance of maintaining a uniform approach to judicial review of administrative action." *Dickinson* v. *Zurko*, 527 U.S. 150, 154 (1999) (citing *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 489 (1951)). As this Court has observed, "[t]he APA was meant to bring uniformity to a field full of variation and diversity." *Id.* at 155. The decision of the court of appeals creates an unjustified anomaly in that it subjects the determinations of one federal agency to a standard of judicial review different from that applied to those of other agencies, whose decisions are reviewed under the general provisions of the APA. As explained below, the court of appeals erred in reallocating the parties' burdens in a manner inconsistent with the established APA rule and uniquely applicable to the VA. Cf. *Director, Office of Workers' Comp. Programs* v. *Greenwich Collieries*, 512 U.S. 267, 280-281 (1994).

2. Under Section 706, the party challenging agency action bears the burden of showing that the agency erred and that its error was prejudicial

The uniform view of the federal courts has been that Section 706 "requires the party asserting error to demonstrate prejudice from the error." *Air Canada* v. *Department of Transp.*, 148 F.3d 1142, 1156 (D.C. Cir. 1998); accord *Campanale & Sons, Inc.* v. *Evans*, 311 F.3d 109, 127 (1st Cir. 2002); *American Airlines, Inc.* v. *Department of Transp.*, 202 F.3d 788, 797 (5th Cir.), cert. denied, 530 U.S. 1274, and 530 U.S. 1284 (2000); *Friends of Iwo Jima* v. *National Capital Planning Comm'n*, 176 F.3d 768, 774 (4th Cir. 1999); *Intercargo Ins. Co.* v. *United States*, 83 F.3d 391, 394 (Fed. Cir. 1996), cert. denied, 519 U.S. 1108 (1997); *Bar MK Ranches* v. *Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *City of Camden* v. *United States Dep't of Labor*, 831 F.2d 449, 451 (3rd Cir. 1987); *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981 (9th Cir.), cert. denied, 389 U.S. 913 (1967); cf. *Kroger Co.* v. *Regional Airport Auth.*, 286 F.3d 382, 389 (6th Cir. 2002); *Beef Nebraska, Inc.* v. *United States*, 807 F.2d 712, 714 n.1 (8th Cir. 1986); *City of Frankfort* v. *FERC*, 678 F.2d 699, 708 (7th Cir. 1982).[4]

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[4] Respondent Simmons suggests (Br. in Opp. 9-10) that some courts have interpreted the APA to impose on the government the burden of showing a lack of prejudice in certain circumstances. But one of the cases she cites did not interpret the APA at all; it held that Section 706 was inapplicable. See *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1336 (10th Cir. 1982) ("We are not persuaded that the violation * * * fits within the § 706 pattern of prejudicial error."). Several of the other cases did set aside agency action under Section 706, but they did so only after identifying evidence of prejudice. See, *e.g.*, *Sierra Club* v. *United States Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) (noting

The interpretation of Section 706 was entrenched by the time Section 7261(b) was enacted in 1988, and Congress was well aware of it. Indeed, the Senate Committee report cited the Ninth Circuit's decision in *Seine & Line Fishermen's Union* for the proposition that, under the rule of prejudicial error, "a court should pass over errors in the record of the administrative proceedings that the court finds not to be significant to the outcome of the matter." S. Rep No. 418, *supra*, at 61. And in *Seine & Line Fishermen's Union*, the Ninth Circuit had stated that "'the burden of showing that prejudice has resulted' is on the party claiming injury from the erroneous rulings." 374 F.2d at 981 (quoting *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943)). Thus, far from contemplating a rule of presumptive reversal like that adopted by the court below, the Committee interpreted the prejudicial-error provision to mean, in accord with the prevailing construction of Section 706, "that a reviewing court should consider reversal only after determining that the identified error caused substantial prejudice to the claimant's case." S. Rep. No. 418, *supra*, at 61.

The rule of prejudicial error under Section 706 applies no differently when the alleged error involves a failure to provide notice of the kind or quality legally

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that reliance on an invalid regulation "permeates" the agency's decision and "directly informed [its] conclusion"). The remaining cases appear to have involved procedural rights—such the right to have notice and an opportunity to comment in a rulemaking—and they stand for the proposition that denial of those rights is prejudicial even if there is no evidence of an effect on the outcome of the proceeding. See, *e.g.*, *Sprint Corp.* v. *FCC*, 315 F.3d 369, 376-377 (D.C. Cir. 2003). That proposition has no application here, since there is no dispute that a VCAA notice error is prejudicial only if it has some effect on the determination of benefits.

required by the VCAA. See *American Coke & Coal Chems. Inst.* v. *EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006). Accordingly, "the party who claims deficient notice bears the burden of proving that any such deficiency was prejudicial." *Friends of Iwo Jima*, 176 F.3d at 774. Indeed, failure to provide notice is a particularly good candidate for a finding of no prejudice, because parties may already know the information that was to be provided in the notice; the factors to which the notice was directed may have little relevance to a particular proceeding; or parties may have nothing to provide in response to the notice. See, *e.g.*, *American Airlines, Inc.*, 202 F.3d at 797 (concluding that a party's "failure to identify the evidence it would have submitted" had it received notice "indicates that [it] was not prejudiced by any inadequacy in" the notice provided by the agency); *Air Canada*, 148 F.3d at 1156-1157 (finding no prejudice where an agency made "a mid-course change in the assignment of the burden of proof" in an administrative proceeding, since petitioners' explanation of what they "would have done differently had they known at the outset of the agency proceedings that they bore the burden of proof" involved presenting evidence on issues that were not "essential to the Department's determination"). Moreover, notice defects can easily be cured, and a defective notice may be effective for its principal purpose despite a technical error. See *Intercargo Ins. Co.*, 83 F.3d at 395 (rejecting the proposition that "any extension notice that does not strictly conform to the 'form and manner' prescribed in the regulation is ineffective," because "not all deviations from the requirements of the statute or regulation would affect the interests that the statute and regulation are designed to protect").

Respondent Simmons notes (Br. in Opp. 8) that the APA, like Section 7261(b)(2), calls for courts to take "due" account of the rule of prejudicial error, and she suggests that reviewing courts should therefore have flexibility in the rule's application. But whatever the proper scope of flexibility and judgment in *applying* the rule, the statute does not give courts discretion to decide what the rule is. Congress intended for courts to apply a specific, pre-existing rule, and as explained above, that rule is one that places the burden of showing prejudice on the party challenging the agency's action.

B. The Court Of Appeals Erred In Creating A Unique Rule Of Prejudicial Error Applicable Only To VA Adjudications

The court of appeals offered several justifications for departing from the settled rule of "linguistic consistency" and traditional principles of prejudicial-error review in the context of VCAA notice errors. First, the court stated that the VCAA had "substantially overhauled the administration of the VA benefits system" and had thereby "abrogated" Congress's previously stated intent to follow the APA rule of prejudicial error. Pet. App. 20a-21a. Second, the court suggested that requiring claimants to demonstrate prejudice would be inconsistent with the "VA's uniquely pro-claimant benefits system." *Id.* at 16a. Third, the court claimed to find support for its holding in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995), cases that concerned the standard of harmless-error review in criminal and habeas corpus proceedings. Pet. App. 15a. None of those rationales withstands scrutiny.

1. The enactment of the VCAA did not alter the rule of prejudicial error set out in Section 7261(b)(2)

The court of appeals justified its departure from the traditional application of the rule of prejudicial error based in part on the enactment of the VCAA, which, according to the court, "substantially overhauled the administration of the VA benefits system." Pet. App. 21a. In the court's view, "[e]ven if Congress had previously intended veterans' claim notice errors to be assessed under the same prejudicial error rule as APA notice errors, such intent was abrogated by the subsequent passage of the VCAA." *Id.* at 20a-21a. That argument rests on a misinterpretation of the VCAA.

a. As an initial matter, even if the court of appeals' interpretation of the VCAA were correct, it would not justify the court's holding. The VCAA did not purport to amend Section 7261(b)(2), and in fact it said nothing at all about the standard of review of administrative benefits determinations. As the court of appeals itself recognized in an earlier case, Section 7261(b)(2) "applies to all Veteran's Court proceedings, and nothing in the VCAA even hints that Congress intended to exempt [the notice requirement] from that general scheme." *Conway* v. *Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004). Thus, even if the VCAA were somehow in tension with the prejudicial-error rule of Section 7261(b)(2) —which it is not—it should not be read to have impliedly amended that provision. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2533 n.8 (2007) ("[W]e have repeatedly recognized that implied amendments are no more favored than implied repeals."). Nor would it be appropriate to allow the general language of the VCAA to displace Section 7261(b)(2), the statutory provision specifically directed

at the standard of prejudicial error in the review of veterans-benefit adjudications. See *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("[S]pecific statutory language should control more general language when there is a conflict between the two.").

b. In any event, the court of appeals' interpretation of the VCAA is not correct. Nothing in the text or legislative history of the VCAA supports the court's assessment that the statute fundamentally altered the VA's claims adjudication process. To the contrary, 38 U.S.C. 5103 (2000 & Supp. V 2005) was enacted as part of a provision of the VCAA whose title made clear that it was intended to be a "[r]eaffirmation and [c]larification" of the VA's already existing "[d]uty to [a]ssist" claimants. VCAA § 3(a), 114 Stat. 2096. The House Committee on Veterans' Affairs noted that the VCAA would require the VA "to notify the claimant (and the claimant's representative) of any additional information and medical and lay evidence necessary to substantiate the claim," and it explained that "[i]t is the Committee's understanding that the Secretary *currently* undertakes to provide this notification to a claimant." H.R. Rep. No. 781, 106th Cong., 2d Sess. 9 (2000) (emphasis added). In other words, the VCAA was not intended to change the VA's practice; it was merely a "codification of [the notice] requirement" aimed at ensuring "a more uniform practice of notifying a claimant of what evidence he or she must provide." *Ibid.*

In fact, as the court of appeals itself has recognized, the VCAA was enacted not to "overhaul" the VA's adjudication process, but simply to overturn the Veterans Court's decision in *Morton* v. *West*, 12 Vet. App. 477 (1999), withdrawn, 14 Vet. App. 174 (2000) (per curiam).

See *Mayfield* v. *Nicholson*, 499 F.3d 1317, 1319 (Fed. Cir. 2007) ("Congress passed the legislation in response to" the Veterans Court's decision in *Morton*.). *Morton* held that, to the extent certain VA regulations and internal procedures required the VA to assist claimants in all cases without regard to whether a claim was well grounded, they were not enforceable on judicial review. See 12 Vet. App. at 485. In the wake of *Morton*, the VA rescinded internal procedures that had instructed VA adjudicators to develop a claim fully before deciding whether it was well grounded. Congress responded by enacting the VCAA, which was intended to be restorative—that is, to return the VA to its pre-*Morton* practice of assisting veterans in the development of their claims. See H.R. Rep. No. 781, *supra*, at 8-9; S. Rep. No. 397, 106th Cong., 2d Sess. 21-22 (2000); 146 Cong. Rec. 19,229 (2000) (statement of Sen. Specter) ("[T]he Senate Committee on Veterans' Affairs has worked to craft * * * a legislative solution that returns VA to the pre-Morton status quo ante."); 146 Cong. Rec. 22,886 (2000) (statement of Rep. Stump) ("The bill addresses the Morton versus West court decision and * * * clarifies VA's duty to assist veterans with their claims.").

With respect to the notice provisions at issue in these cases, the court of appeals' own decisions reflect the similarity of the statutory requirements before and after the enactment of the VCAA. See *Mayfield* v. *Nicholson*, 444 F.3d 1328, 1335 n.3 (Fed. Cir. 2006) ("The pre-2000 version of section 5103(a) contained the core requirement, still found in the post-amendment version, that the Secretary 'shall notify the claimant of the evidence necessary to complete the application.'") (quoting 38 U.S.C. 5103(a) (1994)); *McKnight* v. *Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (discussing the VA's notice

obligations under pre-VCAA law). The history of the VCAA provides no support for the court of appeals' conclusion that the VCAA overhauled the VA claims adjudication system, much less that it altered the application of the rule of prejudicial error.

c. The court of appeals also emphasized that the VCAA's notice requirements have "a fundamental role in furthering an interest that goes to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system," because they help to provide "a claimant a meaningful opportunity to participate effectively in the processing of his or her claim." Pet. App. 15a-16a (quoting *Mayfield* v. *Nicholson*, 19 Vet. App. 103, 120-121 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006)). That observation is correct, but it does not support the conclusion that the VCAA somehow modified the rule of prejudicial error set out in Section 7261(b)(2). Whenever Congress enacts a statute imposing obligations on an agency, it presumably intends to benefit someone or to protect an interest that it deems important. That is not a basis for concluding that, should the agency fail to fulfill those obligations, ordinary principles of prejudicial error are inapplicable.

Moreover, the court of appeals failed to appreciate that Section 7261(b)(2) was itself part of a statute—the Veterans' Judicial Review Act—that codified VA regulations prescribing adjudication procedures beneficial to claimants. Among other things, that statute required the VA to assist claimants in developing evidence and to "give[]" "the benefit of the doubt to the claimant" in cases of "an approximate balance of positive and negative evidence" on any issue material to the claim. Pub. L. No. 100-687, Div. A, § 103, 102 Stat. 4107 (38 U.S.C. 5107(b)). It also required the Board of Veterans' Ap-

peals to provide claimants an opportunity for a hearing before deciding a claim and to provide a statement of the reasons for its decision on all material issues of fact and law. *Id.* §§ 203(a), 205, 102 Stat. 4110, 4111 (38 U.S.C. 7014(a) and (d)); see S. Rep. No. 418, *supra*, at 22-24. Those provisions were intended to affirm the VA's "practice of making every effort to award a benefit to a claimant" and its "obligation * * * to provide complete assistance to the veteran or other claimant in the development of a claim." *Id.* at 32-33. They protect rights just as significant and "fundamental" as those in the VCAA, and their inclusion in the same statute as Section 7261(b)(2) provides strong evidence that Congress did not see any inconsistency between requiring the VA to assist veterans and applying the traditional rule of prejudicial error on judicial review of the agency's decisions.

d. Respondent Simmons suggests (Br. in Opp. 15) that the court of appeals' interpretation is supported by the canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991). The court of appeals did not rely on that argument, and with good reason. To begin with, the canon is applicable only when a statute is ambiguous. Cf. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). "Ambiguity is a creature not of definitional possibilities but of statutory context," *ibid.*, and particularly in light of the well-settled meaning of the language in the APA that Congress borrowed for Section 7261(b)(2), that provision is not ambiguous. Moreover, Section 7261(b)(2) is not a substantive "provision[] for benefits"; it is a procedural statute governing the scope of judicial review. The canon does not apply to such a procedural rule, even when there is statutory ambiguity.

2. The nonadversarial nature of VA administrative proceedings provides no basis for an exception to the generally applicable rule of prejudicial error

The court of appeals stated that the application of the traditional rule of prejudicial error would contravene "Congress's clear desire to create a framework conducive to efficient claim adjudication" and would "create[] a system that practically requires a claimant asserting a notice error to seek counsel simply to be able to navigate the appeal process" to obtain a "fair adjudication." Pet. App. 16a. The court further suggested that such a result would be incompatible with "VA's uniquely pro-claimant benefits system." *Ibid*. That line of reasoning rests on a confusion between the VA's administrative claims-adjudication process and judicial review of the VA's decisions.

As this Court has observed, the VA's administrative claims-adjudication process is nonadversarial and is "designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). Judicial review in the Veterans Court, however, is quite different: it follows the traditional adversarial model of appellate litigation. See *Forshey* v. *Principi*, 284 F.3d 1335, 1355 (Fed. Cir.) (en banc), cert. denied, 537 U.S. 823 (2002). The act of filing an appeal to the Veterans Court "is the first step in an adversarial process challenging the Secretary's decision on benefits," separate and distinct from the VA administrative process. *Bobbitt* v. *Principi*, 17 Vet. App. 547, 552 (2004) (per curiam). Before the Veterans Court, the Secretary of Veterans Affairs is a represented appellee in an appellate court, and claimants likewise are typically represented by counsel. *Ibid*. In Fiscal Year 2007,

about 47% of appellants were represented at the time they filed their appeal to the Veterans Court, and over 80% were represented by the time the case was decided.[5] Thus, even if it were correct that requiring claimants to show prejudice would "require[] a claimant asserting a notice error to seek counsel" to pursue an appeal, Pet. App. 16a, that would not be a basis for an exception to the rule of prejudicial error. In any event, the legal and factual issues relevant to a showing of prejudice are no more complex than any other issues that might be involved in a claimant's appeal to the Veterans Court, so there is no reason why the rule that a claimant must show prejudice should require the retention of counsel if other issues in the case did not.

Moreover, as this Court has noted, "there are wide differences between administrative agencies and courts." *Sims* v. *Apfel*, 530 U.S. 103, 110 (2000) (quoting *Shepard* v. *NLRB*, 459 U.S. 344, 351 (1983)). The rule of prejudicial error is a limit on the exercise of *judicial* authority, and the fact that the challenged decision was reached through a nonadversarial administrative proceeding does not alter the operation of the rule that a party seeking to invoke the remedial powers of a federal court must demonstrate prejudicial error. For example, even though Social Security disability hearings are nonadversarial, courts require a showing of prejudice before remanding based on errors in such proceedings. See*, e.g.*, *Nelson* v. *Apfel*, 131 F.3d 1228, 1236 (7th Cir. 1997); *Shannon* v. *Chater*, 54 F.3d 484, 488 (8th Cir. 1995). There is no reason to apply a different rule here.

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[5] See U.S. Court of Appeals for Veterans Claims, *Annual Reports* <http://www.vetapp.gov/documents/Annual_Reports_2007.pdf>

3. The court of appeals erred in relying on the treatment of harmless error in criminal and habeas corpus proceedings

The court of appeals also claimed to find support for its interpretation of Section 7261(b)(2) in *Kotteakos* v. *United States*, *supr*a, and *O'Neal* v. *McAninch*, *supra*. Pet. App. 15a. Its reliance on those cases was fundamentally misplaced.

a. In *Kotteakos*, this Court reviewed a federal criminal conviction for conspiracy, and it held that the district court had erred in permitting a large number of defendants to be tried together for one conspiracy when the evidence established that there were actually several separate conspiracies. 328 U.S. at 755-756. Applying the harmless-error rule of 28 U.S.C. 391 (1940)—now codified, as amended, at 28 U.S.C. 2111—the Court determined that the error was not harmless. See *Kotteakos*, 328 U.S. at 772-777. In reaching that conclusion, the Court stated that, while an appellant normally has "the burden of showing that any technical errors that he may complain of have affected his substantial rights," when the error "is of such character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will * * * rest upon the one who claims under it." *Id.* at 760 (quoting H.R. Rep. No. 913, 65th Cong., 3d Sess. 1 (1919)).

In *O'Neal*, this Court held that in a habeas corpus proceeding, when a court is in "grave doubt" about the likely effect of a constitutional error on the jury's guilty verdict, it should conclude that the error was not harmless. 513 U.S. at 435-436. In so holding, the Court rejected the argument that the appellant's burden of showing prejudice in an ordinary civil action applies to habeas proceedings. *Id.* at 440. The Court acknowl-

edged the statement in *Palmer*, that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted," 318 U.S. at 116, but it explained that that language referred to technical errors and thus did not encompass errors that have the "natural effect" of prejudicing substantial rights. *O'Neal*, 513 U.S. at 439-440 (quoting H.R. Rep. No. 913, *supra*, at 1).

b. *Kotteakos* and *O'Neal* are inapplicable here because they involved an individual's loss of liberty, not an administrative adjudication of an entitlement to monetary benefits. Cf. *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits * * * have a legitimate claim of entitlement protected by the Due Process Clause."); *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 59-61 (1999). The nature of the proceeding in *Kotteakos*—a criminal prosecution—was crucial to the Court's decision in that case. As the Court explained, although Section 391 was applicable to both civil and criminal cases, the statute "grew out of widespread and deep conviction over the general course of appellate review in American criminal causes." 328 U.S. at 759. And the Court observed that the statute "did not make irrelevant the fact that a person is on trial for his life or his liberty. It did not require the same judgment in such a case as in one involving only some question of civil liability." *Id*. at 763. In fact, just six months after *Kotteakos*, this Court described its decision in that case as involving a review of "the history of [Section 391] and the function it was designed to serve in *criminal* cases." *Fiswick* v. *United States*, 329 U.S. 211, 217-218 (1946) (emphasis added).

Likewise, the Court in *O'Neal* emphasized "the stakes involved" in the proceeding. 513 U.S. at 440.

Specifically, it observed that "the errors being considered by a habeas court occurred in a *criminal* proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake." *Ibid.* In addition, the Court noted, the error involved was "of constitutional dimension"—another consideration that is not present here. *Id.* at 442.

c. The court of appeals attempted to justify its reliance on *Kotteakos* and *O'Neal* by quoting *O'Neal*'s statement that "precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." Pet. App. 15a (quoting *O'Neal*, 513 U.S. at 441). But the Court in *O'Neal* made that observation in the context of 28 U.S.C. 2111, as well as former Section 391, which, "by its terms, applied to both civil and criminal cases." 513 U.S. at 441. The Court also noted that "the current harmless-error sections of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (which use nearly identical language) both refer to § 391 as their statutory source." *Ibid.*

Those federal rules and statutory provisions govern appellate review of a lower court's decision, but they are not applicable to judicial review of administrative proceedings. See *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940) ("[T]o assimilate the relation of * * * administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process."). These cases arise in that quite different context, and involve a different statute that uses different lan-

guage. Compare 38 U.S.C. 7261(b)(2) (Supp. V 2005) (The Veterans Court shall "take due account of the rule of prejudicial error."), with 28 U.S.C. 2111 ("[T]he court shall give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties."). And unlike Section 2111, the statute at issue here has no application to criminal proceedings.

d. Moreover, *O'Neal* considered the appropriate resolution of civil appeals only in cases where there is "grave doubt as to the harmlessness of errors"—that is, cases in which, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise." 513 U.S. at 435, 441. Unlike the error at issue in *O'Neal*—an erroneous jury instruction, see *id.* at 436—the error here could lead to prejudice only by causing the claimant to fail to present evidence that he or she might otherwise have presented. Whatever the proper resolution of a case in which some other claim of prejudicial error is presented or the arguments for and against prejudice are ultimately in "equipoise," it is appropriate to assign to the claimant the burden of showing that he or she had material evidence to present and suffered prejudice because it was not presented.

Even after *O'Neal*, courts of appeals have held that in "ordinary civil cases," the party asserting error has the burden of making a showing of prejudice under 28 U.S.C. 2111 and Federal Rule of Civil Procedure 61. *Morrison Knudsen Corp.* v. *Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1239 (10th Cir. 1999). Thus, if "the parties' failure to provide" "an adequate record and arguments" leaves the court unable to review whether there was prejudice, then "the risk of doubt must rest with the appellant." *Id.* at 1241; see *Tesser* v. *Board of Educ. of the City Sch. Dist.*, 370 F.3d 314, 319-320 (2d Cir. 2004);

Dresser-Rand Co. v. *Virtual Automation Inc.*, 361 F.3d 831, 841-842 (5th Cir. 2004); *In re Watts*, 354 F.3d 1362, 1369 (Fed. Cir. 2004); *Rogers* v. *City of Chi.*, 320 F.3d 748, 751 (7th Cir. 2003); *Cigna Ins. Co.* v. *Oy Saunatec, Ltd.*, 241 F.3d 1, 8 (1st Cir. 2001); *Qualley* v. *Clo-Tex Int'l, Inc.*, 212 F.3d 1123, 1127-1128 (8th Cir. 2000); *Piamba Cortes* v. *American Airlines, Inc.*, 177 F.3d 1272, 1305-1306 (11th Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *Burkhart* v. *Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1214-1215 (D.C. Cir. 1997); but see *Obrey* v. *Johnson*, 400 F.3d 691, 699-702 (9th Cir. 2005). Those were ordinary civil cases that did not involve judicial review of agency action. *A fortiori*, there is no basis for applying a presumption of prejudice in cases such as these, which involve judicial review of an administrative decision—a subject governed by different standards and principles of judicial review.

C. A Presumption Of Prejudice From VCAA Notice Errors Is Unwarranted

Even if Section 7261(b)(2) gave the Veterans Court discretion to decide whether to impose a presumption of prejudice, such a presumption would be inappropriate. Unlike the errors addressed in *Kotteakos* and *O'Neal*, a failure to provide the notice required by Section 5103(a) is not one whose "natural effect is to prejudice a litigant's substantial rights." *Kotteakos*, 328 U.S. at 760 (quoting H.R. Rep. No. 913, *supra*, at 1). To the contrary, there are several reasons why a notice error may result in no prejudice to a VA claimant. The claimant may already be aware, through means other than a VCAA notice, of the types of evidence needed to substantiate his or her claim. Or the claimant may simply have no additional relevant evidence to submit. More

importantly, in contrast to *Kotteakos*, in which review by the court of appeals provided the first opportunity to correct a trial-court error, the informal and non-adversarial process for adjudicating claims for veterans benefits provides many procedural safeguards that have the potential to cure any defect in the initial Section 5103(a) notice. See *Thurber* v. *Brown*, 5 Vet. App. 119, 123 (1993) (The nonadversarial system "is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process."). As a result, it is unlikely that a notice error will truly cause prejudice to a claimant—and there is certainly no basis to conclude that it *invariably* will cause such prejudice. A rule of presumptive prejudice, however, would be difficult for the VA to overcome—even in cases where there is no prejudice—and would therefore lead to unnecessary remands that would delay the resolution of meritorious claims.

1. VCAA notice errors do not have the natural effect of producing prejudice

Under Section 5103(a), the VA is required to notify a claimant "of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." 38 U.S.C. 5103(a). The notice must also "indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary * * * will attempt to obtain." *Ibid.* Although that notice is an important step in the claims-adjudication process, it is the just the beginning of a dialogue between the claimant and the VA that continues throughout the development, adjudication, and appeal of the claim. That multi-step process provides multiple opportunities

for a claimant to obtain necessary evidence and learn of any deficiencies in his or her case.

After the VA provides a claimant with the Section 5103(a) notice, it must make reasonable efforts to obtain public and private records relevant to the claim. 38 U.S.C. 5103A(b) and (c). In a claim for disability compensation, such as those filed by respondents, the VA's assistance must include obtaining the veteran's service medical records, records of relevant VA treatment or examination, and "[a]ny other relevant records held by any Federal department or agency," "unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile." 38 U.S.C. 5103A(b)(3) and (c)(3). The VA must also provide a medical examination or obtain a medical opinion when appropriate. 38 U.S.C. 5103A(d). For example, after the Board found that Sanders had presented evidence to reopen his previously denied claim, the VA provided him with two ophthalmological examinations. Pet. App. 41a, 48a-49a. Similarly, after Simmons filed her initial claim for an increased disability rating, the VA provided her with several audiological examinations in order to evaluate the extent of her service-connected hearing loss. *Id.* at 69a, 88a-91a. In addition, the VA obtained "all identified records from postservice medical care providers," including records of treatment by private medical providers. *Id.* at 86a.

By regulation, all claimants for veterans benefits are entitled to a hearing "at any time on any issue involved in a claim," for the purpose of presenting evidence. 38 C.F.R. 3.103(c)(1) and (2). At such hearings, "[i]t is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have

overlooked and which would be of advantage to the claimant's position." 38 C.F.R. 3.103(c)(2).

If a VA regional office denies a claim, it must give a statement of the reasons for its decision and a summary of the evidence that it considered. 38 U.S.C. 5104(b); 38 C.F.R. 3.103(b)(1). That statement will inform the claimant if benefits were denied because the evidence was insufficient. And the VA's duty to develop the claim continues even after a decision on the claim is issued. If a claimant initiates the VA appellate process by filing a notice of disagreement with the regional-office decision, the VA must take "such development or review action as it deems proper." 38 U.S.C. 7105(d)(1). The claimant also has the right at that stage to have his or her case reviewed by a decision review officer, who is authorized to conduct whatever development of the claim is necessary, including attempting to obtain additional evidence, holding an informal conference with the claimant, or conducting a hearing. 38 C.F.R. 3.2600(c) and (d).

If the disagreement is not resolved, the VA must issue a statement of the case summarizing the reasons for its decision on each issue, the evidence considered, and the relevant statutes and regulations. 38 U.S.C. 7105(d)(1). A claimant may submit additional information or evidence to the VA after a statement of the case has been provided; if the disagreement is still not resolved, the VA will provide the claimant with a supplemental statement of the case. 38 C.F.R. 19.31(a) and 20.302(c). Those statements identify the areas in which the claim was found deficient and thus provide notice of the type of evidence still needed in order to substantiate the claim. For example, one of the supplemental statements of the case provided to Sanders listed the evidence that the regional office had considered, see J.A. 12

and it advised him to "please notify us" of any "other medical evidence you would like us to consider" so that "we [can] make a reasonable effort to obtain it," J.A. 21. See J.A. 32 (supplemental statement of the case listing evidence considered in Simmons's case); *id.* at 30 (informing Simmons that "we are giving you a period of 60 days to make any comment you wish concerning the additional information" identified in the supplemental statement).

The VA's duty to assist—and a claimant's opportunity to present evidence and argument—continues during the VA appellate process. The Board has the power to consider newly submitted evidence if the claimant waives consideration in the first instance by the regional office. 38 C.F.R. 20.1304(c); see *Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 327 F.3d 1339, 1346-1348 (Fed. Cir. 2003). In addition, a claimant is entitled to a hearing to allow the Board "to receive argument and testimony relevant and material to the appellate issue." 38 C.F.R. 20.700(b); 38 U.S.C. 7107(b). The Board may also obtain an expert medical opinion if appropriate. 38 U.S.C. 7109(a). Finally, the Board may remand the case to the regional office if further evidence or clarification of the evidence is necessary to decide the appeal. 38 C.F.R. 19.9.

In sum, between the VA's initial notice under Section 5103(a) and the time an appeal is brought before the Veterans Court, the VA will likely have taken numerous steps designed to assist claimants in obtaining necessary evidence and to inform them of any deficiencies in the evidence in a case. There is therefore no basis for a conclusion that any VA error in providing notice under Section 5103(a) at the outset of that multi-stage and protec-

tive process will have the "natural effect" of producing prejudice.

2. A benefits claimant is in a better position than the VA to establish whether a VCAA notice error has caused prejudice

Under the decisions of the court of appeals, the VA would be able to prevail in a case of VCAA notice error only by rebutting the presumption that the claimant was prejudiced. Pet. App. 19a. It is likely that the VA would be unable to meet that burden in many cases—even those in which there was not, in fact, any prejudice as a result of the error. For example, the court of appeals noted that the VA could overcome the presumption of prejudice by showing that "any defect was cured by actual knowledge on the part of the claimant." *Id.* at 14a-15a. But while the claimant is presumably aware of whether he or she had actual knowledge, the VA is unlikely to have any evidence bearing on that issue. Similarly, it might be true that "a benefit could not possibly have been awarded" in a particular case, *id.* at 63a, because there is no evidence supporting the claim. But the VA might have no way of affirmatively demonstrating the absence of any further evidence that would support the claim. See *Elkins* v. *United States*, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative."). By contrast, if there actually *is* evidence concerning the claimant's medical condition that is not already in the record and would demonstrate that benefits could be awarded, the claimant is far more likely to be the one with access to that information.

In these cases, for example, Sanders allegedly failed to receive notice of "who would ultimately be responsible for obtaining evidence necessary to substantiate [his]

claim," Pet. App. 38a, while Simmons allegedly failed to receive notice "of the evidentiary prerequisites for establishing" her claim, *id.* at 78a. Those errors might have prejudiced respondents by making it more difficult for them to provide appropriate evidentiary support for their claims. The only way to determine whether there was prejudice, however, is to conduct an inquiry into whether, in the absence of the notice error, respondents would have been able to submit additional evidence. The record before the Veterans Court includes the VA's entire file, and respondents are in a far better position than the VA to know what additional evidence they might have submitted about their own medical condition. A presumption of prejudice is therefore inconsistent with the general principle that burdens are appropriately placed on the party who is more likely to have knowledge of the relevant facts. See *United States* v. *Fior d'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002).

Because of the difficulty of overcoming a presumption of prejudice, such a presumption would generate a large number of remands, in each of which the VA would be required to send the case back to the regional office, provide an additional notice to the appellant, await a response from the appellant, and then readjudicate the remanded claim. To make matters worse, the VA has a statutory obligation to provide expedited treatment to remanded claims. See 38 U.S.C. 5109B, 7112 (Supp. V 2005). Many of those remands would be pointless because, for reasons known to the claimant but not the VA, the notice error would have made no difference to the outcome of the proceeding. Such remands would divert resources from the adjudication of meritorious claims. The VA receives more than 800,000 benefits applications

every year,[6] and the additional remands would place further strain on the VA's already burdened claims-administration process, delaying awards of benefits on meritorious claims. By contrast, placing on the claimant the burden of showing prejudice would better serve the purposes of Section 7261(b)(2) because it would limit remands to cases in which the agency's error actually affected the outcome of the proceeding.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2008

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[6] See *Examining the U.S. Department of Veterans Affairs' Claims Processing System: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the House Comm. on Veterans' Affairs*, 110th Cong., 2d Sess. (2008) <http://veterans.house.gov/hearings/Testimony_Print.aspx?newsid=189&Name=_Michael__Walcoff> (statement of Deputy Under Secretary Michael Walcoff, Dep't of Veterans Affairs, Veterans Benefits Admin.).

APPENDIX

1. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 38 U.S.C. 5103 (2000 & Supp. V 2005) provides in pertinent part:

Notice to claimants of required information and evidence

(a) REQUIRED INFORMATION AND EVIDENCE.—Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

* * * * *

3. 38 U.S.C. 7261 (2000 & Supp. V 2005) provides in pertinent part:

Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

* * * * *